LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
SEP 28 1962
JOHN F. DAVIS, CLERK

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1962

No. 19

CHARLES PAUL, Director of Agriculture of the State of California, and STANLEY MOSK, Attorney General of the State of California,

Appellants,

vs.

UNITED STATES,

Appellee.

Appeal from the United States District Court for the Northern District of California, Southern Division

AMICUS CURIAE BRIEF OF PETALUMA COOPERATIVE CREAMERY IN SUPPORT OF POSITION OF APPELLANTS

JOSEPH A. RATTIGAN,
1041 College Avenue,
Santa Rosa, California,
Attorney for Petaluma Cooperative Creamery, Amicus Curiae.

INDEX

	Page
Amicus Curiae Brief filed with consent of parties	1
Interest of Amicus Curiae	2
Argument	6
(1) The State of California retains jurisdiction over Oakland Army Terminal	7
(2) The State of California retains jurisdiction over Travis Air Force Base, and	
(3) The State of California retains jurisdiction over Castle Air Force Base	12
(4) The California Milk Stabilization Act does not, under the Federal Constitution, conflict with Federal Procurement Statutes	16
Conclusion	22

Table of Authorities Cited

Cases

	Pages
Fort Leavenworth R. R. Co. v. Lowe, 114 U.S. 525 [1885]	11
James v. Dravo Contracting Co., 302 U.S. 134 [1937]	12
Pacific Coast Dairy v. Department, 19 C. 2d 818 [1943]	21
Penn Dairies v. Milk Control Commission, 318 U.S. 261 [1943]	16, 17, 20, 21, 22
Public Utilities Commission v. United States, 355 U.S. 534 [1958]	16, 17, 18, 19, 20, 21
Surplus Trading Co. v. Cook, 281 U.S. 647 [1930]	15

California Statutes

Agricultural Code:	
Section 1190 et seq.	2
Sections 4200 to 4420	2
Section 4217	3
Sections 4225 to 4231	3

Pages

Section 4226 3
Section 4246 3
Section 4350 et seq. 3
Section 4355(d) and (e) 3

Government Code:
Section 111 ..... 13, 14
Section 113, enacted 1891, as amended (Statutes of 1947, Chapter 1532, page 3164) 11, 12
Section 114 (Statutes of 1943, Chapter 134, page 898, based on Statutes of 1897, Chapter 56, page 51) 14, 15
Section 126, as amended (Statutes 1st Ex. Sess. 1946, Chapter 154, page 199, as amended, Statutes of 1947, Chapter 1532, page 3163) 7, 8, 9, 10, 11, 12

Political Code:
Section 34, as amended (Statutes of 1939, Chapter 710, page 2231) 13, 14

Public Utilities Code:
Section 530 18

Statutes of 1943:
Chapter 134, page 898, effective August 4, 1943 13
Chapter 134, page 1009 13

Constitution and Federal Statutes

United States Constitution:
Article I, Section 8, Clauses 11-16 6
Article I, Section 8, Clause 17 ..... 6, 8, 10
Article VI, Section 2 ..... 6, 7, 16

Armed Forces Procurement Act of 1947 (62 Statutes 21, 10 U.S.C. 2301 et seq.) 2

28 U.S.C. 1253 7

Other Statutes

Arkansas Acts of 1903, page 346 15

Miscellaneous

23 Ops. Cal. Atty. Gen. 14 [1954] 13

State Lands Commission Resolution adopted October 5, 1950 8

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1962

No. 19

CHARLES PAUL, Director of Agriculture of the State of California, and STANLEY MOSK, Attorney General of the State of California,
Appellants,

vs.

UNITED STATES,
Appellee.

Appeal from the United States District Court for the Northern District of California, Southern Division

AMICUS CURIAE BRIEF OF PETALUMA COOPERATIVE CREAMERY IN SUPPORT OF POSITION OF APPELLANTS

BRIEF FILED WITH CONSENT OF PARTIES

All parties to this case have consented to the filing of this brief. Their written consents have been filed concurrently herewith.

INTEREST OF AMICUS CURIAE

Petaluma Cooperative Creamery is a nonprofit cooperative association, organized in corporate form under Section 1190 et seq., California Agricultural Code. Petaluma Cooperative Creamery (hereinafter referred to as "Petaluma Co-op") has been continuously engaged in the production and marketing of milk and other dairy products since its founding in 1913. Its membership is comprised of 275 independent milk producers who own and operate dairy farms in the North Coastal counties of California. Each of these dairy farmers, and Petaluma Co-op, are "small business concerns" within the meaning of the Armed Forces Procurement Act of 1947 (62 Statutes 21, 10 U.S.C. 2301 et seq.), an interpretation of which is a primary issue in this case.

Petaluma Co-op's dairy-farmer members own dairy farms in Marin, Sonoma, Napa, Lake and Mendocino Counties in California. Among them and through Petaluma Co-op, they produce 20 million gallons of fluid milk each year. This is approximately one-fortieth of the entire annual fluid milk production of California. The entire 20-million gallon output is shipped to Petaluma Co-op. Approximately 60% of this milk is resold to other milk distributors.

All of Petaluma Co-op's functions are performed under the California Milk Stabilization Act (Sections 4200 to 4420, inclusive, California Agricultural Code). As a producer of milk, Petaluma Co-op receives a producer price for the milk sold to other distributors. The producer price is established for

Petaluma Co-op's marketing area by the Director of the California Department of Agriculture (Section 4246, *Ibid.*). Petaluma Co-op is also a distributor of milk ("Producer-distributor," Section 4217, *Ibid.*). As such, it sells the remaining 40% of its members' production to retail stores and consumers. Under the California Act, the price received for this category of milk is the minimum wholesale or retail price also established by the Director (Sections 4350 et seq., *Ibid.*). These latter prices are based, *inter alia,* upon the production and handling costs of milk distributors, including Petaluma Co-op (Section 4355 [d] and [e], *Ibid.*).

The price Petaluma Co-op receives for its milk, whether sold by it as a producer or as a distributor, depends upon the classification—i.e., usage—of the milk sold (Sections 4225 to 4231, *Ibid.*). Its most favorable price is the one received for milk sold for a Class One usage as defined in Section 4226 (*Ibid.*: milk sold in its unconverted natural fluid form for human consumption). The price received for milk sold by Petaluma Co-op as a producer will vary with usage. The price received for milk it sells as a distributor is a Class One price, from which Petaluma Co-op returns the Class One producer price to its members for that milk. In this category, Petaluma Co-op formerly bid on milk contracts for Federal military installations. Its bid in a given instance would be the Class One wholesale price it was entitled to recover for the Class One usage involved, less a quantity discount permitted by the Director of the Department of Agriculture under State law.

Under the injunction presently in effect in this case, the low-bid price collectible by Petaluma Co-op in military business must necessarily be less than the discounted Class One wholesale price to which it would be entitled under the California Act. As stated above, the computation of this State-controlled price includes factors for Petaluma Co-op's production and handling costs as a milk distributor. Engaging in military business on a competitive low-bid basis means, therefore, selling "military milk" below cost. Petaluma Co-op, finding this to be an economic impossibility, has therefore been compelled to withdraw from the military market. The direct result of its withdrawal has been a reduction in its gross revenue amounting approximately to $14,000.00 each month, or $170,000.00 annually. This sum is vital to Petaluma Co-op's operating margin as a cooperative association, and to its 275 farmer members.

Amicus has recited the foregoing facts to define its important interest in the determination of the questions presented by this case. Typically, its interest is measured and presented economically—in terms of dollar loss. Its interest might also be stated *legally* by reason of the present status of the injunction imposed upon it in this case. Petaluma Co-op's dual identity as a producer *and* distributor is a functional illustration of the important conjunctive relationship between producer pricing *and* distributor pricing under the California Milk Stabilization Act.

The judgment entered by the three-judge district court herein permanently enjoined appellant State

officers from the enforcement of producer pricing and distributor (wholesale) pricing of milk purchased by distributors to officers' clubs, post exchanges, commissaries and mess halls at Castle Air Force Base (Castle), Travis Air Force Base (Travis) and Oakland Army Terminal (Oakland). Thereafter, upon appropriate proceedings in this court, the injunction against enforcement of producer pricing—and only producer pricing—was stayed.

The consequent dichotomy has been an additional reason for Petaluma Co-op's forced withdrawal from the military milk business. The District Court has in effect enjoined its recovery of a State-controlled wholesale price in the military market. The State law, however, still requires it to pay its producer members a State-controlled price for the same milk. Petaluma Co-op recites these additional facts to indicate that it has a substantial legal interest in the determination of the questions now before this Court. They serve, further, to illustrate that enforcement of the California Milk Stabilization Act should be permitted as to both price categories—not as a matter of convenience to Petaluma Co-op, but because its present anomalous situation demonstrates that the *conjunctive* relationship between producer pricing and wholesale pricing under the State law is the legal and economic heart of the State law itself.

ARGUMENT

The function of Appellants and their Amici Curiae —in any case—is immemorial and demonstrable: to claim and prove error in the deliberations of the court below. The case (originally two cases) at bar was decided below without a trial on the merits and upon motions and affidavits. 190 F. Supp. 645, 659-660. The District Court's subsequent memorandum opinion on the motions before it (190 F. Supp. 645) was adopted as the findings of fact and conclusions of law in the action. R. 648. If error appears, therefore, it appears in the District Court's opinion.

A summary view of the opinion indicates that the District Court first held and found that, under two provisions of the Constitution of the United States,[1] the California Milk Stabilization Act could not constitutionally be enforced, because the United States had exclusive jurisdiction in each instance, at:

(1) Oakland (190 F. Supp. 645, at 649-652);

(2) Travis, jurisdiction having assertedly been transferred to the United States concurrently with, and collateral to, its land acquisitions at Travis (190 F. Supp. 645, 652-653); nor, for the same reason, at

(3) Castle (190 F. Supp. 645, 653-654); and

(4) Alternatively, and by operation of the Supremacy Clause,[2] that the California Milk Stabilization Act " 'places a prohibition on the Federal Government' . . . and, therefore, so conflicts with federal

[1] Article I, Section 8, Clauses 11-16 (War Clauses); *Ibid.*, Clause 17 (Power of Exclusive Legislation).

[2] Article VI, Clause 2, Constitution of the United States.

procurement statutes and policy as to be invalid under the Supremacy Clause, Art. VI, Sec. 2." (190 F. Supp. 645, 657).

This Court, by order entered January 15, 1962, requested briefs and arguments on the question of its jurisdiction on direct appeal under 28 U.S.C. 1253, and postponed consideration of the jurisdictional question until a hearing of this cause on its merits. 368 U.S. 965. Appellants' Brief ("Jurisdiction," Page 2 et seq.) fully argues Appellants' position on the jurisdictional question. Amicus Curiae adopts Appellants' position in this regard and their supporting argument: and joins Appellants in the assertion (Page 10, *Ibid.*) that "this Court has jurisdiction of these direct appeals under 28 U.S.C. 2281. (Citations)."

Alternatively, Amicus adopts Appellants' position in seeking a writ of certiorari, as set forth in Appellants' separate petition before the Court.

In claiming error by the District Court, Amicus argues that:

(1)

THE STATE OF CALIFORNIA RETAINS JURISDICTION OVER OAKLAND ARMY TERMINAL.

The District Court held and found (190 F. Supp. 645, 650) that the State of California consented to the Oakland land acquisitions in the language of Section 126 of its Government Code.[3]

---

[3]The text of Section 126, Government Code, as amended (Statutes 1st Ex. Sess. 1946, Chapter 154, Page 199, as amended, Statutes of 1947, Chapter 1532, Page 3163, read in relevant part as follows:

This cannot be entirely true as to the fact of consent alone, apart from the fact of transfer of jurisdiction. Section 126 required—as a clear condition of California's consent becoming an executed fact—that the State Lands Commission must make findings, and recorded orders or resolutions, that the acquisition is "within the purview of Clause 17 of Section 8 of Article I of the Constitution of the United States," that it complies with Federal law, that the United States has acquired title and has "in writing . . . assented to jurisdiction over the land," and that the "acquisition is in the interest of the State."

With regard to Oakland, the United States "assented to jurisdiction in writing" by application filed with the State Lands Commission by the Department of the Army on July 5, 1950. R. 368. The State Lands Commission, by resolution adopted October 5, 1950, found the conditions to have existed. R. 140, 148.

". . . the Legislature of California *consents to the acquisition by the United States of land within this State* upon and subject to each and all of the following express conditions and reservations, *in addition to any other conditions or reservations prescribed by law:*

"(a) The acquisition must . . . within the purview of Clause 17 of Section 8 of Article I of the Constitution of the United States;

"(b) The acquisition must be pursuant to and in compliance with the laws of the United States;

"(c) The United States must in writing have assented to acceptance of jurisdiction over the land upon and *subject to each and all of the conditions and reservations in this section prescribed;*

"(d) . . .

"(e) In granting the consent, the Legislature and the State reserve . . . the State's entire power of taxation . . .; and reserve to all persons residing on such land all civil and political rights . . . which they might have were this consent not given." (Emphasis added.)

But the Oakland enclave was acquired by piecemeal fee acquisition of eleven (11) parcels of land between January 15, 1941, and September 11, 1953,[4] and by lease of fourteen others. The July 5, 1950, "assent to jurisdiction" by the Secretary of War included descriptions of ten (10) of the parcels and a portion of another.[5] It did not include 123.33 remaining acres of the eleventh fee parcel (acquired later), nor any of the fourteen leased parcels. By force of Section 126 of the California Government Code, the vital "assent to jurisdiction" by the United States, as an element of State consent to the acquisition, is an executed fact only in part.

Partial consent may exist, effective as to some parcels of land and not others. This is not to say, however, that the part-cloak of *consent* brings with it a part-mantle of *jurisdiction*. It would distort reason as well as history to conclude that State jurisdiction, residual in the Oakland enclave for lack of Federal assent as to one parcel of land, lapses when it reaches the boundary of another parcel.

State consent at Oakland, then, is incomplete in terms of *area*. Its incompleteness dramatically illustrates the error implicit in the finding that consent *ipso facto* operates to transfer exclusive jurisdiction. The element of consent is a single fact. The element of a transfer of exclusive jurisdiction is another.

---

[4]See detailed list of Oakland parcels, Brief For Appellants, Pages 130, 132; *Ibid.*, Appendix, Page 231.

[5]Parcel A-114, excluding 123.33 acres acquired September 11, 1953. R. 93-94, See reference *supra*, Footnote 4.

Either fact stands proven or not: but the latter, clearly, cannot be found to exist as a passenger on the dubious vehicle of the former.

This is even more evident upon an examination of Section 126 itself. In its functional language, "the Legislature of California consents to the *acquisition by the United States of land . . .*" (Emphasis added). With this language, the Legislature of California does nothing else. Section 126 does not mention jurisdiction, nor its transfer, surrender or passage. The District Court finds the transfer of jurisdiction within the statute by implication.

Rationalizing, its memorandum opinion (190 F. Supp. 645, 650) notes that Section 126 expressly refers to the U. S. Constitution, Article I, Section 8, Clause 17. Section 126 does contain such a reference. The District Court, though, says then that Clause 17 ". . . deals specifically with the acquisition by the United States of 'exclusive legislative jurisdiction' over lands purchased by the United States . . . with the consent of the legislature of the State." Clause 17 does *not* so deal.

Explicitly, Clause 17 deals with the power of the Congress "to exercise exclusive legislation" in areas federally purchased with State consent. By its own terms or otherwise, this endowment of power is not self-executing. The Congressional power has not been exercised at Oakland in the field of milk marketing. Failing such exercise, there is nothing before the Court to support the conclusion that California, acknowledging in its own statute the existence of a con-

stitutional power in the Congress, thereby strips itself of jurisdiction to enforce another of its own statutes.

The District Court acknowledges (190 F. Supp. 645, 651) the concurrent effect, at the time of the Oakland acquisition, of Section 113 of the California Government Code, originally enacted in 1891.[6] In effect, though, it holds that Section 113, reserving State criminal jurisdiction, did not qualify Section 126, conditionally granting State consent to the Oakland land acquisition. The court's holding turns entirely upon a selective reference choosing between the words "ceded" and "conveyed" in Section 113. It reasons that California's legislative intent, in enacting Section 113 in 1891, was derived from this Court's decision in establishing "cession" as a process whereby, in a proper case, a State could transfer to the United States exclusive jurisdiction of a Federal enclave (citing and referring to *Fort Leavenworth R. R. Co v. Lowe,* 114 U.S. 525 [1885]).

The cited historical sequence—an 1891 enactment using the word "ceded" after an 1885 decision validating the fact of "cession"—is perhaps persuasive as to California's legislative *motive* in enacting Section 113. Whether it qualified the 1872 enactment—Section 126—is, however, a matter of legislative *intent*. The intent of the California Legislature, that Section

---

[6] As amended (Statutes of 1947, Chapter 1532, Page 3164), Section 113 read:

"The State reserves the administration of the criminal law of the State with respect to any land over which any jurisdiction has been or may be ceded or conveyed to the United States, during the time the United States is the owner thereof."

113 qualify Section 126, is clear from the plain language employed in Section 113; that California reserves the administration of her criminal laws on "any land over which any jurisdiction has been or may be ceded *or conveyed* to the United States . . ." (Emphasis added). The District Court deals with the disjunctive by ignoring it—holding that "ceded or conveyed" means only "ceded."

Amicus concurs with Appellants' point that the requirement of Federal "assent to jurisdiction" at Oakland was inoperative to transfer jurisdiction because it was incomplete; that, in the context of California law, the fact of State consent to a land acquisition does not *ipso facto* transfer exclusive jurisdiction over the land acquired; and that, at Oakland, California effectively reserved her criminal jurisdiction in any case. (*James v. Dravo Contracting Co.*, 302 U.S. 134, 143 [1937]).

It follows that the California Milk Stabilization Act may be enforced as to contractors delivering milk to Oakland.

---

(2)

THE STATE OF CALIFORNIA RETAINS JURISDICTION OVER TRAVIS AIR FORCE BASE, AND

(3)

THE STATE OF CALIFORNIA RETAINS JURISDICTION OVER CASTLE AIR FORCE BASE.

The District Court held and found (190 F. Supp. 645, at 651-653) that the United States acquired ex-

clusive jurisdiction over Travis and Castle because both were acquired while Section 34, California Political Code,[7] was in effect. As to Parcel "A" at Castle, a successor statute[8] seems to have been in effect. In both statutes, California consented "to the purchase or condemnation by the United States of any tract of land" for the same stated military purposes. In both statutes, California expressly reserved the authority (in Section 34 by reciting an "express condition," in Section 111 by expressly "reserving authority") to serve process and to tax.

As at Oakland, the District Court views consent and sees a surrender of jurisdiction. As at Oakland, Amicus respectfully insists that the one does not yield the other.

The sole authority for the lower court's reasoning as to Travis and Castle is the 1954 opinion by the Attorney General of California (23 Ops. Cal. Atty. Gen. 14 [1954]). The opinion in question does not

---

[7]Section 34, California Political Code, as amended (Statutes of 1939, Chapter 710, Page 2231). The text, in relevant part, read:

> "The Legislature consents to the purchase or condemnation by the United States of any tract of land within this State, for the purpose of erecting forts, magazines, dockyards, and other needful buildings, . . ."

[8]Statutes of 1943, Chapter 134, Page 898, effective August 4, 1943, succeeded Section 34, Political Code. The prior statute, enacted in 1872, was repealed effective August 4, 1943 (Statutes of 1943, Chapter 134, Page 1009). Section 111, Government Code, provided that:

> "The Legislature consents to the purchase or condemnation by the United States of any tract of land within the State for the purpose of erecting forts, magazines, arsenals, dockyards and other needful buildings, reserving the authority to serve and execute process and the State's entire power of taxation as provided in this article."

support its own conclusions. In it, the Attorney General examined the existence and extent of Federal jurisdiction at Fort Ord, California. A principal point before him involved Section 114, California Government Code.[9] The same point is involved in the case at bar. In the Fort Ord situation, the United States had not filed for record, nor had anyone recorded, the required metes and bounds of the land acquired. In the Travis and Castle acquisition, the United States similarly omitted to make the prescribed recordation. R. 643, 644, 646.

The Attorney General believed in 1954, and the lower court herein agreed in 1960, that jurisdiction passes with consent despite the omission of recordation. The Attorney General ruled that the 1872 statute (Section 34, Political Code—Section 111, Government Code) and the 1897 enactment (Section 114, Government Code) were inconsistent. To avoid finding that the 1897 act repealed its predecessor by implication, he separated them as to scope. He declared that the 1872 statute affected only Federal acquisitions for "constitutional military purposes," the 1897

---

[9]Statutes of 1943, Chapter 134, Page 898; based on Statutes of 1897, Chapter 56, Page 51. The text:

"The State cedes to the United States exclusive jurisdiction over all lands within the State held, occupied or reserved on March 2, 1897 by the United States for military purposes or defense, and over all land which has thereafter been or which may be ceded or conveyed to the United States for such purposes, reserving the authority to serve and execute process, and the State's entire power of taxation. A sufficient description of metes and bounds and a map or plat of the lands shall first be filed in the proper office of record in the county in which the lands are located."

statute affecting those "for military purposes or defense other than the constitutionally designated purposes."

This semantic splitoff wholly ignores the plain language of the 1897 statute, which applies to all lands "within this State held . . . by the Government of the United States *for military purposes or defense*, or which may be hereafter ceded or conveyed to said United States for such purposes." This broad range of military purposes does not restrict itself to "non-constitutional purposes."

Further, the opinion—and, by reference to it as sole authority, the District Court herein—relies wholly on this Court's decision in *Surplus Trading Co. v. Cook*, 281 U.S. 647 (1930). This reliance was cast without reference to the totally distinguishing fact that, in *Surplus*, this Court was examining a State statute[10] which contained an expression of State consent and an explicit and *unqualified cession of State jurisdiction*. The only cession of jurisdiction by California which would have operated as to Travis and Castle was by reason of the *qualified* language of Section 114, Government Code (quoted *supra*, Footnote 9). The qualification: recordation of descriptions and maps. In or since the Travis and Castle acquisitions

---

[10] Arkansas Acts of 1903, Page 346, which provided in part:

"The State of Arkansas hereby consents to the purchase . . . by the United States, of any site or ground for the erection of any armory, arsenal, fort; fortification, navy yard, custom house, light house, lock, dam, fish hatcheries, or other public buildings of any kind whatever, *and the jurisdiction of this State, within and over all grounds thus purchased by the United States . . . is hereby ceded to the United States.*" (Emphasis added.)

by the United States, there has been no recordation. Accordingly, the acquisitions did not meet the *qualifications* of cession of jurisdiction by California; accordingly, there was no cession of jurisdiction; and California's jurisdiction survived and persists at Travis and at Castle, as at Oakland.

---

(4)

THE CALIFORNIA MILK STABILIZATION ACT DOES NOT, UNDER THE FEDERAL CONSTITUTION, CONFLICT WITH FEDERAL PROCUREMENT STATUTES.

The District Court herein further held and found, under its own caption "The Issue of the Supremacy Clause" (190 F. Supp. 645, 654), that the California Milk Stabilization Act was invalid under Article VI, Section 2 of the Constitution of the United States. Claiming error, Amicus refers directly to the lower court's definitive language (190 F. Supp. 645, 657):

> "We conclude, therefore, that even if the Penn Dairies Case[11] has not been in effect overruled by the Public Utilities Case,[12] it is inapplicable here because the California Milk Stabilization Act 'places a prohibition on the Federal Government' within the meaning of the Public Utilities Case, and, therefore, so conflicts with federal procurement statutes and policy as to be invalid under the Supremacy Clause, Art. VI, Sec. 2."

---

[11]Referring to *Penn Dairies v. Milk Control Commission*, 318 U.S. 261 (1943).

[12]Referring to *Public Utilities Commission v. United States*, 355 U.S. 534 (1958).

The District Court clearly made this vital finding (that the *Penn Dairies* case was inapplicable) upon two alternative lines of reasoning: (a) that the *Public Utilities* decision had possibly overruled it, or (b) that *Public Utilities* controls because its facts comprising a "prohibition on the Federal Government" are comparable with the facts in the case at bar and distinguishable from the facts in *Penn Dairies*. Amicus respectfully submits that both lines of reasoning are in error.

(a) The decision in *Public Utilities v. United States* did *not* overrule the decision in *Penn Dairies v. Milk Control Commission*. This Court, in *Public Utilities*, was explicit (355 U.S. 534, 543-544):

> "We also need do no more than mention cases where, absent a conflicting federal regulation, a State seeks to impose safety or other requirements on a contractor who does business for the United States. See, e.g. . . . (Citations) . . .; Penn Dairies v. Milk Control Com. 318 U.S. 261, 87 L ed 748, 63 S Ct 617, *can likewise be put to one side*. There the question, much mooted, was whether the federal policy conflicted with the state policy fixing the price of milk which the United States purchased. The Court concluded that the state regulation 'imposes no prohibition on the national government or its officers.' Id. 318 US at 270." (Emphasis added.)

With the above-quoted language, this Court, in *Public Utilities*, did not overrule *Penn Dairies*, but distinguished its facts. The distinguishing factual element was the absence of a "prohibition on the national government."

(b) There was no "prohibition on the Federal Government" ("national government") in the *Penn Dairies* case. There is none in the facts before the Court in the instant case. *Public Utilities* does not control here, and this Court should again draw the essential distinction.

In the *Public Utilities* case, this Court dealt with a California statute which had recently been amended. In its form prior to amendment, it had *permitted* California common carriers "to transport, free or at reduced rates: . . . property for the United States."[13] As amended in 1955, it permitted this practice *only if expressly permitted by the State's regulatory agency: and then only "to such extent and subject to such conditions as it* (the agency) *may consider just and reasonable."* (Parenthetical interpolation added.)[14] The effect of the amendment was to change a permissive practice to a conditionally permissive practice; to regulate previously unregulated rates; and to require the Federal Government to negotiate and purchase its hauling at State-approved rates, instance by instance.

Carried to this point and no further, the Federal Government—purchasing military hauling in California—was ostensibly placed in the same position as it is when purchasing military milk in California under

---

[13]Section 530, California Public Utilities Code as amended, cited in *Public Utilities Commission v. United States*, 355 U.S. 534, 535 (1958).

[14]Section 530, California Public Utilities Code as amended, cited in *Public Utilities Commission v. United States*, 355 U.S. 534, 535 (1958).

the facts at bar. The respective situations, though, can be compared *only in the light of the effect of the respective regulatory statutes.* It immediately appears that, in *Public Utilities,* the *effect* of subjecting the Federal Government's activity—hauling—to State regulation was such as to *prevent or frustrate the activity itself.* Consider these observations, by this Court, in reviewing the *Public Utilities* facts. (355 U.S. 534, 545):

> "The seriousness of the impact of California's regulation on the action of federal procurement officials is dramatically shown by this record."

The Court further commented, quoting a finding by the court below (*Ibid.,* pages 545-546):

> "(Enforcement) '. . . would make it necessary for the shipping officers to classify the hundreds and thousands of different items used in military operations, to segregate such items in accordance with published tariffs and classifications, to rearrange the boxing and crating of such items in order to meet the classifications and requirements of commercial traffic and fill out voluminous documents. This additional process *would cause delays* as high as thirteen hours in the shipment of one truckload or carload. *In many situations a delay of this sort would seriously hamper or disrupt the military mission for which the shipment was made.*'
>
> "Moreover, no rates exist for much of the military traffic, which means that, unless the United States can negotiate rates for each shipment, *the shipments will be delayed for Commission action . . .*

> "General Edmond C. R. Lasher of the United States Army, who was Assistant Chief of Transportation, testified at the trial: 'for us to make these arrangements at the Washington level with the various states, let us say 48 states, with 48 varieties of methods to follow, we would find ourselves in an administrative morass out of which we would never fight our way, *we would never win the war.*'" (Emphasis added.)

The factual situation so depicted in *Public Utilities* is a far cry from the Federal Government's position under the California Milk Stabilization Act. In *Public Utilities,* the efficiency of the Federal activity —even the activity itself—was "hampered," "disrupted," "delayed." The effect of the California statute was to frustrate the military mission itself ("We would never win the war"), and it imposed on the United States a clearly insuperable burden. This was a "prohibition on the Federal Government"; it "prohibited" the proper discharge of the Federal Government's function.

Under the California Milk Act, the United States assumes only the burden of price; it is not "hampered," "disrupted," or "delayed." For a comparable situation—one dealing with the purchase of milk, not military hauling—we are perforce referred to the *Penn Dairies* decision, where this Court stated (318 U.S. 257, 270):

> ". . . the state regulation imposes no prohibition on the national government or its officers. *They may purchase milk from whom and at what price they will, without incurring any pen-*

> *alty. . . .* As in the case of state taxation of the seller, the government is affected only as the state's regulation may increase the price of milk. . . ." (Emphasis added.)

This is the situation under the regulatory milk statute in California in the case at bar. The administration of her Milk Stabilization Act develops a factor in the total cost of discharging the Federal military function. It does not adversely affect the actual discharge of that function.

Federal milk procurement officials "may purchase milk from whom and at what price they will, without incurring any penalty." (*Pacific Coast Dairy v. Department*, 19 C. 2d 818, 830 [1943].)

Pennsylvania did not hamstring the Federal military function with her Milk Control Law in the *Penn Dairies* case. The State of California's Milk Stabilization Act is similarly innocuous. Pennsylvania did not "prohibit" the Federal Government—and California does not. Accordingly, the *Public Utilities* decision does not control, and the District Court erred in applying it to the facts now before this Court.

The action of the court below operated to disturb the delicate balance of dual sovereignty. Dealing with the facts before it, the District Court should best have heeded the admonition of Mr. Chief Justice Stone in the same *Penn Dairies* decision it disregarded. He noted (318 U.S. 261, 275):

> "An unexpressed purpose of Congress to set aside statutes of the states regulating their in-

ternal affairs is not lightly to be inferred and ought not to be implied where the legislative command, read in the light of its history, remains ambiguous. Considerations which lead us not to favor repeal of statutes by implication (citing cases) should be at least as persuasive when the question is one of the nullification of state power by Congressional legislation."

CONCLUSION

Amicus respectfully requests that this Court reiterate its position as stated in *Penn Dairies v. Milk Control Commission,* 318 U.S. 261, declaring that the State of California may constitutionally enforce both the minimum producer pricing and minimum wholesale pricing provisions of its Milk Stabilization Act as to producers and distributors selling fluid milk to the United States; and declaring, further, that California exercises essential jurisdiction over the Federal military enclaves involved in this case. Upon such declarations, the judgments of the District Court herein should be reversed.

Dated, Santa Rosa, California,
September 18, 1962.

Respectfully submitted,
JOSEPH A. RATTIGAN,
Attorney for Petaluma Cooperative Creamery, Amicus Curiae.